United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-6003

To be argued by
SOL BOGEN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-6003

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and THE CITY OF NEW YORK,

Plaintiffs-Appellees,

-against-

LOCAL 638 . . . LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 28 JOINT APPRENTICESHIP COMMITTEE,

Defendants-Appellants,

SHEET METAL AND AIR-CONDITIONING CONTRACTORS' ASSOCIATION OF NEW YORK CITY, INC., etc.

Defendants.

- -

LOCAL 28,

Third-Party Plaintiff,

-against-

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Third-Party Defendant.

- -

LOCAL 28 JOINT APPRENTICESHIP COMMITTEE,

Fourth-Party Plaintiff,

-against-

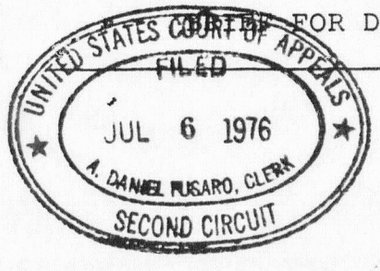
NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Fourth-Party Defendant.

- -

On Appeal From The United States District Court
For The Southern District of New York

BRIEF FOR DEFENDANTS-APPELLANTS



SOL BOGEN, ESQ.
Attorney for Defendants-Appellants,
Sheet Metal Workers International
Association, Local Union No. 28
and Local 28 Joint Apprenticeship
Committee

July 6, 1976

SOL BOGEN
ONE PENN PLAZA
NEW YORK, N. Y. 10001

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BRIEF FOR DEFENDANTS-APPELLANTS

PRELIMINARY STATEMENT OF THE CASE

By a Decision and Order entered July 18, 1975 ("Decision and Order")(A. 68)[1] and by an Order and Judgment entered August 29, 1975 ("Order and Judgment")(A.127), the district court (Werker, J.) held that Sheet Metal Workers' International Association, Local Union No. 28 ("Local 28" or "Union") had discriminated against non-whites[2] in various membership practices. As part of its determination the District Court ordered the appointment of an Administrator to formulate specific procedures in the nature of an affirmative action program so as to achieve a goal of 29% non-white membership in Local 28 (A. 107).

Thereafter, Local 28 and the Union Trustees of the Local 28 Joint Apprenticeship Committee ("JAC") filed a joint appeal to this Court from the aforementioned Decision and Order and Order and Judgment[3] (A. 1332).

On March 8, 1976, this Court (Feinberg and Smith, C.J.J., and Ward, D.J.) issued its decision which, inter alia,

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1. References are to the first and second joint appendix.

2. "Non-whites" was defined for the purposes of this action as blacks and Spanish-surnamed persons.

3. The Employer Trustees to the JAC have joined with the Union Trustees in the instant appeal.

reversed so much of the Decision and Judgment which granted non-whites an artificial preference, based solely on race, in admission to the JAC apprenticeship program. EEOC v. Local 28, Sheet Metal Workers', 532 F.2d 821 (2nd Cir. 1976).

While the aforementioned appeal from the Decision and Order and Order and Judgment was sub judice, the court-appointed Administrator commenced formulation of specific affirmative action procedures to achieve the stated goal.[4]

In or about October 1975 the court-appointed Administrator proposed an Affirmative Action Program which was submitted to the district court for approval (A. 1335). Objections thereto were timely presented by appellants herein. By Memorandum and Order dated October 23, 1975, the court approved certain of the provisions of the proposed program, modified others, and directed the submission of a program revised in accordance with the Memorandum and Order. On November 25, 1975 the district court entered an Order, dated November 13, 1975, approving the Affirmative Action Program as modified (the Affirmative Action Program and the Order are one document and are hereinafter referred to as the "AAP&O")(A. 1373).

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4. The Decision and Order and Order and Judgment provided for broad relief in the nature of cessation of discriminatory practices as well as the formulation of percentage goals designed to increase minority representation in the membership of Local 28. The district court did not, however, specify all of the particular procedures through which the goals were to be achieved. Rather, it directed that the Administrator formulate, implement and supervise procedures, subject to the district court's approval (A. 133).

ISSUES PRESENTED

Whether the district court erred in directing:

(1) That the racial goals for membership in Local 28 be computed on the basis of a definition of "total membership" which includes individuals who are retired and, accordingly, are neither active members of the Union nor are part of the available labor force (¶ 2 of the AAP&O).

(2) The substitution of the established Local 28 Examining Board by a tripartite board, one each selected by the Administrator, plaintiffs and the Union (¶ 13 of the AAP&O).[5]

(3) The establishment of a program for direct admission of non-whites to journeyman membership in Local 28 on the basis of experience alone, in total disregard of a non-discriminatory journeyman's test (¶ 15 of the AAP&O).

(4) The artificial preference in favor of non-whites for admission to journeyman status (¶ 14 of the AAP&O).

(5) The establishment of a program for advanced admission and placement of non-whites in the JAC apprenticeship program based solely on race (¶¶ 33, 34 and 35 of the AAP&O).

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5. Although ¶ 13 of the AAP&O merely directs substitution of the individuals in the Local 28 Examining Board without specific reference to the replacement of non-whites, it clearly was intended to accomplish that purpose, and in fact the two appointments made by the plaintiffs-appellees and the Administrator were non-whites.

(6) The artificial preferences with respect to the reduction and installment payment of initiation fees, as well as conditional membership, for non-whites, based solely on race (¶¶ 16(a), (b) and 17 of the AAP&O).

(7) The requirement that the JAC indenture 300 apprentices by July 1, 1976 and no less than 200 in each year thereafter, to and including 1981, without regard to the (i) needs or requirements of the industry, (ii) available job opportunities and (iii) results of the apprentice entrance examination (¶ 22 of the AAP&O).

(8) The artificial, preferred assignment for employment of apprentices in a ratio of not less than 1 apprentice for every 4 journeymen, and the elimination of a bona fide, non-discriminatory seniority system for apprentice assignments (¶ 23 of the AAP&O).

(9) That the procedures for journeyman admission to Local 28 should be available to persons who reside outside of Local 28's jurisdiction, to wit, the five boroughs of New York City (¶¶ 10, 15 of the AAP&O).

STATUTE INVOLVED

The statute involved in the proceedings below and on this appeal is Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, et seq. ("Title VII"). The relevant portions of the statute, Section 703(j) (42 U.S.C. §2000e-2(j)), Section 706(g) (42 U.S.C. §2000e-5(g)), and Section 707(a) (42 U.S.C. §2000e-6(a)), are reproduced in full in an addendum to this Brief.

STATEMENT OF FACTS

All of the facts relevant to this proceeding have been set forth by this Court in its decision on appeal from the Decision and Order and Order and Judgment of the District Court. EEOC v. Local 28, Sheet Metal Workers', supra.

Since the date of that decision there are no new facts which bear on the issues raised in this appeal. Rather, the issues at bar involve solely the propriety of the subject portions of the AAP&O, as a matter of law.

ARGUMENT

POINT I

THE INCLUSION OF PENSIONERS IN THE CALCULATION OF UNION MEMGERSHIP UPON WHICH RACIAL GOALS ARE PREDICTATED IS UNREASONABLE AND IMPROPER

A. Introduction

In its Order and Judgment, the district court ordered that pensioners be included in the definition of "combined membership of Local 28," to which total number the racial goal of 29% would be applied, while leaving to the AAP&O the formulation of the definition of "pensioner" (A. 132).

The AAP&O defines pensioner as follows (¶ 2)(A. 1374):

> "For the purpose of measurement, total membership shall include all journeyman members, all pensioners [6] who have been employed as sheet metal workers within the last three years, and all members or participants in the Local 28 Apprentice Program."

This definition of pensioners includes all Local 28 members who, prior to becoming pensioners, were employed as journeyman sheet metal workers at any time within the last three years. Thus, individuals who were working members of Local 28 three years ago, but are now retired and completely withdrawn from the labor force, would be included in the total membership of Local 28 for the purpose of computing the racial goal.

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6. "Pensioner", as used in the Program, means any individual who receives benefits from the Local 28 pension program. [Footnote in original]

B. The AAP&O Definition of Pensioner Is Inconsistent With The Theory On Which The District Court Computed the 29% Goal.

The district court, in computing the 29% racial goal, considered the relevant labor force statistics (A. 106). The principle underlying the district court's computation of that goal is that a non-discriminatory admissions policy will produce a minority composition among Local 28 members equal to the minority composition of the relevant labor force in the union's jurisdiction. See Rios v. Enterprise Association Steamfitters, Local 638, 501 F.2d 622, 632-33 (2nd Cir. 1974).

The Equal Employment Opportunity Commission ("EEOC") originally proposed that pensioners be included in the total membership figure to avoid the possibility that the Union might encourage journeymen to go on pension, yet continue to work, thereby shrinking the total active membership. The response, as appellants suggested to the Administrator (A. 1442-47) and the district court (A. 1489), is to include in the definition of total membership all pensioners who work while on pension status.[7] Thus, any pensioner who has worked during the preceding three years, while on pension, would be included in the definition of total membership.

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7. Pensioners may conditionally return to work and earn up to a maximum of $2,400 per year. Such employment has not been available during the past four years because of severe unemployment.

The inclusion within the definition of "total membership" of all pensioners who have worked as sheet metal journeymen prior to retirement, but who have not worked since retirement, distorts the figure upon which the Court's racial goal is computed and does not properly reflect the relevant labor force. The effect of inclusion of non-active pensioners will mean that the goal of 29% non-whites in total membership, including pensioners, would substantially exceed 29% of the relevant labor force, the active membership of the Union. Thus, in accordance with the principles utilized by the district court in arriving at the figure of 29% as a goal, the proper definition of the existing relevant labor force (Local 28's membership) should include only those members who, subsequent to becoming pensioners, are employed as sheet metal workers within the last three years.

Appellants' proposed definition is both consistent with the purpose of the racial goal embodied in the AAP&O as well as the method by which the district court originally computed the goal.

The inclusion of pensioners who do not work during their retirement in the calculation of the relevant labor force is erroneous and has been so held by this Court in Rios, supra.

There, standards for computing racial membership goals were established. The concept of "relevant labor force" was deemed to be essential to the computation of a goal which would reflect the source of Union membership (at 633):

> "However we believe that reliable statistics with respect to the labor force provide a more accurate basis for arriving at an appropriate non-white percentage goal than does the information relied upon by the district court, which included not only males forming the labor force, but females, children, retired persons and others who would not, absent discrimination, have been the source of Union members or apprentices." [Emphasis added]

The very same reasons that justify the inclusion of only those persons in the relevant work force in determining the basis for establishing a membership goal, require that only those union members who comprise the active working membership of Local 28 should be included in the definition of total membership. To do otherwise would go beyond what is intended by the establishment of a gogal in the first instance and flies in the face of the language of this Court in Rios, supra.

The use of similar standards in defining relevant labor force and total membership is essential to avoid the danger that a racial membership goal will become an unjustifiable form of reverse discrimination in application. This danger was recognized in Rios, supra (at 633):

"However, we believe that from the outset the court should be guided by the most precise standards and statistics available in view of the delicate constitutional balance that must be struck in the use of such goals or quotas between the elimination of discriminatory effects, which is permissible, and the involvement of the court in unjustifiable 'reverse racial discrimination,' which is not."

For these reasons, the inclusion of pensioners as defined in the AAP&O in the "total membership" of Local 28 for purposes of the application of racial goals is improper.

POINT II

THE SUBSTITUTION OF THE ESTABLISHED LOCAL 28 EXAMINING BOARD WITH A TRIPARTITE BOARD OF EXAMINERS SELECTED BY THE ADMINISTRATOR, THE PLAINTIFFS AND THE UNION, RESPECTIVELY, IS UNREASONABLE AND IMPROPER

As part of the relief ordered by the district court, Local 28 was directed to administer a "hands-on" journeyman's test on October 11, 1975 and at least once a year thereafter (A. 136). A "hands-on" journeyman's test is a practical test designed to evaluate the ability of the applicant to perform duties normally required of an average sheet metal journeyman on a daily basis. In 1968 and 1969, Local 28 administered journeymen's tests. The 1968 test included both a written portion consisting of questions testing a general knowledge of sheet metal and a portion testing general knowledge of mathematics (A. 1287-1295). The 1969 test included a similar portion testing general knowledge of sheet metal, but the math portion was confined to questions more directly related to sheet metal math (A. 1308-1314).

The district court held that the 1968 exam had an adverse impact on non-whites, but could reach no conclusion as to the 1969 test (A. 95).[8] There was no finding, indeed

8. This determination was based exclusively on the disproportionate number of non-whites who did not pass. However, the district court made no determination as to the job relatedness of the exam.

no allegation or proof of discrimination with respect to the administration or grading of the tests by the Local 28 Examining Board.

In implementation of the broad relief directed, the AAP&O requires (¶ 8) (A. 1378) that a "hands-on" test, professionally developed and validated, be administered in the spring of 1976 and yearly thereafter. Furthermore, the AAP&O requires (¶ 13)(A. 1381) that the "hands-on" journeyman's test be graded by a Board of Examiners consisting of three members knowledgeable in sheet metal, one member to be appointed by Local 28, the Administrator, and the Appellees, respectively.[9]

This provision of the AAP&O, as implemented, thus requires that the established Local 28 Examining Board, consisting of three white members of Local 28 and a Chairman, Robert Schulter, be replaced by a three-member Board of Examiners now consisting of two minority members. For the very reasons why this Court struck down the substitution of a white JAC trustee with a non-white JAC trustee, the new alteration of the established Local 28 Examining Board is entirely unnecessary and improper.

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9. Pursuant to the AAP&O, the parties selected representatives to the Board of Examiners in February of 1976. Local 28 selected Edward Stack, the late president of the Local 28. The plaintiffs selected Charles Saunders, a black journeyman member of Local 28, and the Administrator selected William Gonzales, a Spanish-surnamed journeyman member. The selection of two non-whites by the Administrator and the plaintiffs was the result to be realistically anticipated by ¶ 13 of the AAP&O.

In the proceeding below, there was never any allegation or claim that the Local 28 Examining Board, at any time, engaged in any conduct that was improper or discriminatory.

There was never any allegation or finding that any of the members of the Examining Board engaged in any discriminatory acts in the administration, conduct or grading of the journeyman's examinations.

Most critically, the district court's Decision and Order and Order and Judgment did not mention or suggest that the structure or membership of the Local 28 Examining Board be altered or modified (cf. the Court's directive regarding the composition of the JAC). Such change was proposed unilaterally by the Administrator without any findings or conclusions as to the necessity or propriety of such action. Furthermore, the fact that the established Local 28 Examining Board conducted, graded and had general responsibility for the administration of the October 1975 journeyman's examination without charge or allegation of any impropriety demonstrates the unnecessary and unwarranted nature of this directive.

In the absence of any contrary findings by the district court, it must be assumed that the members of the Local 28 Examining Board were qualified to retain their positions and,

in fact, have so demonstrated. The substitution of the Local 28 Examining Board, in view of the active supervision, by the Administrator, is precisely the type of unnecessary action and interference with the internal affairs of the Union which this Court forbid in the first appeal (532 F.2d 821, at 830):

> "While we agree that the record here amply demonstrates the need for a court-appointed administrator and for an injunction against the defendants, we do not approve of the district court's decision to require replacement of one of the JAC representatives. Such an action seems superfluous in light of the broad supervisory powers granted to the administrator who, for purposes of compliance with Title VII, will serve as the superior of the JAC representatives. Any recalcitrance on the part of the JAC representatives may be overcome by the exercise of the administrator's authority."

As with the replacement of one of the JAC trustees, the substitution of white members of the Local 28 Examining Board is entirely unnecessary and superfluous. The Administrator is vested with broad supervisory powers and is specifically directed to supervise the administration of the "hands-on" journeyman's test given by Local 28 (AAP&O, ¶¶ 5, 8).

Furthermore, the substitution of the white members of the Local 28 Examining Board is an abridgement of union self-government, "an ideal to which the law aspires, 29 U.S.C. §401." See 532 F.2d at 829. The appointment of an administrator,

held to be "clearly appropriate" by this Court, id. at 829, is all that is required to ensure compliance with the AAP&O, and no greater infringement upon internal union governance is either necessary or appropriate.

Lastly, the substitution of two white members with non-whites cannot be justified under the guidelines established by this Court in the first appeal. Thus, what was forbidden as to the JAC trustees is qually forbidden as to the Local 28 Examining Board (id. at 630):

> "Moreover, this part of the district court's order cannot be justified under the 'non-identifiability' test adopted by this court in Kirkland. The district court's order with respect to the appointment of a minority-group JAC representative is, in effect, a quota mandating that one-third of the JAC's membership be of minority descent. This is, moreover, a quota which must be met by replacing (or, in the parlance of the trade, by 'bumping') a white incumbent from the JAC. This is forbidden by Title VII and the law of this circuit.
>
> "In this instance, the impact of the racial goal would be direct, immediate and obvious: one of the two JAC representatives of the Union must be 'bumped.' This is the type of narrowly-focused ascertainable reverse discrimination which Kirkland and its predecessors forbid and, accordingly, we reverse that part of the district court's order requiring replacement of an incumbent JAC representative."

As there appears to be neither basis in fact nor justification in law for the substitution of the Local 28 Examining Board by a Board of Examiners composed of two non-whites, this aspect of the AAP&O should be stricken.

POINT III

THE ESTABLISHMENT OF A PROGRAM FOR DIRECT ADMISSION TO JOURNEYMAN MEMBERSHIP IN LOCAL 28 FOR NON-WHITES ON THE BASIS OF EXPERIENCE IS NOT WARRANTED BY THE RECORD

Paragraph 15 of the AAP&O (A. 1382) provides for the establishment, commencing January 1, 1976, of a program for direct admission to Local 28 journeyman membership of non-whites who have had four years' experience in sheet metal work or employment of a reasonably related or similar nature.[10] This program is exclusively available to non-whites, and does not involve the administration of a test, validated or otherwise. Rather, the Administrator is required to establish application procedures, including investigation and verification of the qualifications of the applicant. The AAP&O then establishes the minimal requirements of residence, age and fitness for persons eligible for admission under this program. These requirements are identical to those for applicants for the "hands-on" journeman's test (¶ 10, AAP&O), except that greater experience is required of applicants under the direct admission program.[11]

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10. The AAP&O (¶¶ 33, 34 and 35) also provides for a program for the admission and advanced placement in the Apprentice Program of non-whites who have experience in sheet metal or trade education, but cannot perform at journeyman level. Appellants have, likewise, appealed from those provisions of the AAP&O. However, since the grounds for the impropriety of those portions of the AAP&O are similar to appellants' objections to direct admission herein, we shall not burden the Court by separately stating such arguments.

11. Only one year of experience is required of applicants for the journeyman's test (A. 1379).

As noted above, Point II, supra, the court below ordered that Local 28 administer professionally developed and validated "hands-on" journeyman's tests for admission to Local 28. This remedy was viewed as necessary to insure that journeymen be admitted to membership only after satisfactorily demonstrating their ability on a non-discriminatory, job-related test. The direct admission program, however, circumvents the requirement of a validly administered, job-related test, contrary to the intent of Title VII. Griggs v. Duke Power Co., 401 U.S. 424 (1971); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

This Court has held that Griggs requires that the results of job-related tests are to be respected. In EEOC v. Local 28, Sheet Metal Workers', supra, the Court held that it was improper to impose a ratio of minority to white acceptances into the apprenticeship program, where to do so would require accepting a minority applicant with a lower score than a white applicant. Thus, the majority held (532 F.2d at 831):

> "My colleagues feel that this is unacceptable under Griggs, Kirkland and Title VII as we interpret them above. They consider that the import of those authorities is that the results of job-related tests are to be honored since they are genuinely neutral in intent and effect, i.e., they make ability to perform the sole criterion for selection. They hold that it is inconsistent with this policy to administer admittedly neutral, non-discriminatory tests (approved by the EEOC) and then set those results aside because of the racial make-up of the applicants who pass.

"They hold that Griggs and 42 U.S.C. § 2000e-2(b) require that test results be respected whenever those tests are validly job-related." [Emphasis added]

For the reasons set forth by this Court, the direct admission program is inconsistent with the policy, as enunciated by Griggs and Title VII, that neutral, non-discriminatory tests be the sole criterion for selection and admission into the Union. Not only does the direct admission program not require a validated test, but its sole reason for existence is to provide a preferential avenue of admission into the Union for non-whites seeking to avoid taking the very test specifically ordered by the lower court and approved by this Court. What status would be accorded the results of the journeyman's test if a non-white with four years' experience (and who may even have failed a test in the past) can opt for direct admission rather than take the exam?

Thus, the controlling precedent of this Circuit and the Supreme Court suggest that once a non-discriminatory test is ordered, it should be the sole means of evaluating qualifications for journeyman status.

Moreover, the lack of any established or articulated standards by which, ultimately, the Administrator is to review applicants for direct admission permits, perhaps encourages the inconsistent and undisciplined evaluations of applicant qualifications which is the very evil sought to be avoided by a non-discriminatory "hands-on" journeyman's examination. See Griggs v. Duke Power Co., supra.

Finally, the direct admission program is also improper as it constitutes a preference given to non-whites over whites in admission, notwithstanding that the non-whites involved have not been shown to be past victims of unlawful discrimination. It is the clear teaching of this Court that a preference based solely on race, without proof of actual past discrimination, is unlawful "reverse discrimination" under Title VII and § 1983 of the Civil Rights Act. EEOC v. Local 28, supra; Chance v. Board of Examiners, _____ F.2d _____, Slip. Op. 6587 (2nd Cir. 1976); Acha v. Beame, 531 F.2d 648 (2nd Cir. 1976); Kirkland v. New York State Department of Correctional Services, 529 F.2d 430 (2nd Cir. 1975). See also, McDonald v. Santa Fe Trail Transportation Co., _____ U.S._____, 12 FEP Cases 1577 (1976).

Accordingly, the preference accorded non-whites for admission to Local 28 membership[12] should be stricken from the AAP&O.

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12. Similarly, the preference accorded non-whites for advanced placement in the apprentice program should be eliminated (see fn. 10, supra).

POINT IV

THE ARTIFICIAL PREFERENCE IN FAVOR OF NON-WHITES FOR ADMISSION TO JOURNEYMAN STATUS IS IMPROPER

Paragraph 14 of the AAP&O imposes a preference in favor of non-whites for admission to journeyman status through the "hands-on" test on the basis of a ratio and without regard to their performance on the "hands-on" journeyman's test[13] (A. 1382). This preference is identical in all major respects to the racial preferences provided in the AAP&O (¶ 30) for admission to the apprentice program, which was invalidated by this Court on the first appeal. Thus, the preference in favor of non-whites for admission to journeyman status is likewise invalid.

In EEOC v. Local 28, supra, this Court held that it was improper to impose a ratio of minority to white acceptances into the apprentice program, where to do so would require accepting a minority applicant with a lower score than a white applicant on the apprentice examination. 532 F.2d at 831. For the same reasons, the instant preference (¶ 14) cannot stand. No distinction can rationally be drawn between a preference as applied to the admission of journeyman or to the admission of apprentices. In either case, the results of a non-discriminatory test should be the sole criteria for admission.

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13. The AAP&O provides for a ratio to be determined by the Administrator. To date, no such determination has been made, probably because this precise ratio was stricken by this Court in the first appeal. However, inasmuch as the AAP&O provision has not been modified, since the determination of the first appeal herein, and inasmuch as there is no indication that it will not be sought to be implemented hereafter, appellants have presented this issue now so as to avoid a possible subsequent appeal.

POINT V

THE AAP&O PROVISIONS PERMITTING THE REDUCTION OR INSTALLMENT PAYMENT OF INITIATION FEES IN LOCAL 28 FOR NON-WHITES IS IMPROPER

The AAP&O provides for various preferences to non-whites who qualify for admission to journeyman membership in Local 28. Paragraph 16(a)(A. 1384) authorizes the Administrator to reduce the initiation fee for non-whites eligible for admission pursuant to the provisions of Paragraph 22(d) of the Order and Judgment (A. 144) of the district court. Similarly, Paragraph 16(b) of the AAP&O permits the installment payment of the initiation fee for non-whites based upon the financial circumstances of the applicant and in proportion to their income during periods of employment. Paragraph 17 provides for conditional membership for non-whites pending the Administrator's determination of the applicant's request for reduction and/or installment payments of the initiation fee.[14]

All of the above provisions (¶¶ 16(a), (b) and 17) are improper under the Court's decision in the first appeal. First, the remedy imposed is totally unrelated to any findings

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14. If an application for reduction and/or installment payments of the initiation fee has been pending before the Administrator for more than five days, a non-white eligible for admission is admitted conditionally to journeyman membership upon payment of $56 and one month's dues pending the Administrator's decision (¶ 17 of the AAP&O) (A. 1385).

of illegal discrimination. There was no finding that Local 28 required different initiation fees for non-whites and whites; or that there was any discrimination in regard to the payment or installment payment of initiation fees; or that anyone, white or non-white, was permitted conditional membership; or that the Union's procedures for the payment of its initiation fee was discriminatory in any manner. In the absence of any finding of discrimination with respect to the payment of initiation fees, the district court has improperly provided for preferential treatment for non-whites admitted to journeyman status.

Further, the above-enumerated artificial preferences constitute impermissible reverse discrimination because non-whites receive favored treatment on no other basis than race alone. It is now clear beyond peradventure that a preference accorded solely on the basis of race is impermissible reverse discrimination. EEOC v. Local 28, supra at 832; Chance v. Board of Examiners, supra; Acha v. Beame, supra.

POINT VI

THE AAP&O's DIRECTIVE THAT JAC INDENTURE SPECIFIED MINIMUM NUMBERS OF APPRENTICES IS UNREALISTIC, UNREASONABLE AND IMPROPER

Paragraph 22 of the AAP&O (A. 1387) requires that "no less than 300 apprentices by July 1, 1976 of which no less than 100 apprentices shall be indentured by February 2, 1976. No less than 200 apprentices shall be indentured in each year thereafter up to and including 1981."

Entrance into the apprentice program is dependent upon the successful scoring on "(1) a basic 'read and follow directions' test designed to ascertain an applicant's ability to master and understand those written and verbal instructions, directions, and other communications necessary to participate in the Apprentice Program at the first year level; and (2) a mechanical comprehension test similar in substance and scope to mechanical comprehension test administered by JAC in April 1969. There shall be professionally developed and validated a qualifying score on the 'read and follow directions' test designed to reflect the minimum ability necessary to participate in the Apprentice Program at the first year level." (AAP&O, ¶ 28) (A. 1389).

The requirement that the JAC indenture a specified minimum number of apprentices is both an unwarranted infringement on the right of the Union and the Contractors' Association

to establish manpower requirements through the process of collective bargaining, as well as being inconsistent with the rationale of the Supreme Court in Griggs v. Duke Power Co., supra.

The court below specifically found that the manpower requirements of the Contractors' Association is a mandatory subject of collective bargaining between the Association and Local 28 (A. 75, Findings of Fact, #13). One of the most fundamental rights of unions and employers is the freedom to determine by collective bargaining the manpower needs of their industry. At least in the first instance, the Union and the Contractors' Association here should be permitted to negotiate such needs. Thereafter, their results can be examined and evaluated by the Administrator and the Court to determine whether their conduct measures up to the standards of the requisite affirmative action.

To impose preemptively a fixed number of apprentices to be indentured and employed without regard to job opportunities, present and future, and the adequacy of training, serves no purpose but to undermine and eventually destroy the apprentice program.

It is significant to note that no court has ever required that an employer hire employees, whether white or non-white, for which it has no need; at most, courts have required that as part of an affirmative action program the employer, if it hires at all, must do so as to implement affirmative action. Moreover, noting that it is the employers, members of the Contractors' Association, who are required to pay the costs of the apprentice program (i.e., cost of classroom instructions and salaries paid to apprentices while receiving such instructions), this directive is, in fact, tantamount to requiring an employer to hire individuals it does not need.

Furthermore, the relief ordered by the AAP&O (¶ 22) is inconsistent with the requirements of Title VII. As this Court held in the first appeal, the results of a non-discriminatory test must be respected as the sole criterion for selection to the Apprentice Program. 532 F.2d at 831. What purpose or significance will the administration of such a test have, if a fixed minimum number of applicants must be accepted without regard to their performance on the test? For example, if only 200 people take the apprentice exam, the JAC would be required to indenture all of the applicants, regardless of their test performance. Such a result is clearly inconsistent with the rationale of Griggs and the holding of this Court in the first appeal.

In addition, since there is no way to predict the racial composition of successful applicants, this provision of the AAP&O may well be counterproductive to the attainment of the goals directed. Thus, if less than 29% of the successful applicants are non-white, the instant requirement will not only further dilute the employment opportunities for all apprentices, but contrary to the goals of affirmative action, the minority underrepresentation will be increased.

POINT VII

THE DISTRICT COURT IMPROPERLY DIRECTED SUBSTANTIAL CHANGES IN THE WORK ASSIGNMENT PROCEDURES OF APPRENTICES

Paragraph 23 of the AAP&O directs two significant changes in the method of work assignments for apprentices which serve to grant improper, artificial preferences for apprentices.

First, it directs that: "Apprentices shall be assigned for employment in a ratio of not less than one apprentice for every four journeymen working of the aggregate journeymen employed." (A. 1387).

Second, seniority is not to be considered a criterion for employment, and apprentices are to be rotated for employment where necessary and feasible.

A. The 1:4 Ratio, Apprentices to Journeymen, Constitutes An Invalid Preference

The imposition of the 1:4 ratio for assignment of apprentices has the impact of limiting the number of journeyment who will be able to perform the available work. The ratio, based upon the "aggregate journeymen employed", in essence, requires that every fifth employee be an apprentice, whether or not required by the employer. The additional journeymen in excess of the ratio will either be "bumped" or the employer will be required to pay for an unneeded apprentice.

The ratio concept has always been considered by JAC, the Contractors' Association and Local 28 on a flexible situation-by-situation basis. In the past, the ratio has never been employed to determine how many apprentices should be employed, but rather it is a minimum in a given shop or site to confirm proper training and safety for apprentices. Thus, the ratio was considered to serve as a guideline, suggesting that a minimum of four to seven working journeymen were necessary before the assignment of an apprentice was feasible. In some shops and jobsites there may be an even larger number of journeymen working without any apprentices by reason of the working conditions and safety requirements. Thus the 1:4 ratio, or any ratio whatsoever, applied as a maximum rather than a minimum, is a complete departure from prior usage or custom and may create an imminent safety peril to all jobsite employees, journeymen and apprentices.

Appellants respectfully submit that a work rule which the parties deem necessary (i) to preserve safe working conditions and (ii) to provide adequate apprentice training as to which no finding or claim of discrimination was ever made, should not be disregarded.[15] For the same reasons stated in Point IV, supra, the ratio is an unwarranted infringement on the

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15. The decision and Order and Judgment contained no determination that the flexible ratio is designed, intended, or had the effect of discrimination against non-whites.

parties' right to establish work rules and manpower requirements through the process of collective bargaining. Additionally, the implementation of such a ratio is inconsistent with the rationale and holding in Franks v. Bowman Transportation Company, Inc., ____U.S._____, 95 S.Ct. 1251 (1976). In Bowman, the Supreme Court held that the district court could grant retroactive or constructive seniority to those employees who had actually been the past victims of the employer's discriminatory hiring practices. Only those identifiable employees who had suffered as a result of the discrimination in hiring were held to be entitled to an award of seniority relief. See also Acha v. Beame, supra.

The imposition of a ratio of 1:4 will clearly adversely affect the employment opportunities of current journeymen. The distinction between journeymen and apprentices, based as it is on experience and capability, is an implicit form of seniority. The rationale of Bowman prohibits any interference with seniority rights unless the individual to whom the preference is given is an identifiable victim of past discrimination. Here, there is no requirement that any of the apprentices who derive benefit from the work assignment ratio be the identifiable victims of past discrimination. In fact, the blanket application of the 1:4 ratio accords a preference to all apprentices, including whites. No one is suggesting that white

apprentices are entitled to a preference over journeymen in work assignments, and to accord them a preference based solely because they are apprentices is totally irrational and unrelated to the discrimination found and the relief necessary to remedy it. To accord that self-same preference to non-whites who have not been the identifiable victims of past discrimination is prohibited reverse discrimination. See, e.g., Kirkland v. New York State Department of Corrections, 520 F.2d 420 (2nd Cir. 1975). See also, McDonald v. Santa Fe Trail Transportation Co., ____ U.S. _____, 12 FEP Cases 1577 (1976).

B. Any Alteration in the Seniority Provisions With Respect to Assignment of Apprentices Is Inconsistent With Franks v. Bowman Transportation Company, Inc.

Prior to the AAP&O, apprentices had been assigned to available jobs on the basis of experience in the apprentice program, i.e., a concept of seniority consistent with the needs of the employers. The AAP&O (¶ 23) requires that: "Seniority shall not be a criterion for employment, and apprentices shall be rotated for employment where necessary and feasible." (A. 1387). Such an order is invalid under the principles enunciated in Franks v. Bowman Transportation Company, Inc., supra, and Acha v. Beame, supra, since it destroys a bona fide "seniority" system which has never been found to be discriminatory, either in impact or in preserving the effects of

past discrimination.[16]

Furthermore, there is no requirement that any of the apprentices who are to receive preferential treatment by the rotation system be the identifiable victims of past discrimination. There are no findings or conclusions that any of the apprentices have been denied their rightful place in the apprentice program. In the absence of any such findings, it is manifestly improper to alter the operation of the existing JAC apprentice program. No artificial "seniority" may be granted without a finding of actual discrimination; the "seniority" principles may not be ignored. This aspect of the AAP&O is clearly inconsistent with Bowman and Acha. Indeed, since the AAP&O proposes to go much further than according "seniority" status to non-whites (it totally emasculates the entire "seniority" system), a fortiori, it is violative of the principles continued in Bowman, supra, and Acha, supra. See also, United States v. Bethlehem Steel Corporation, 446 F.2d 652 (2nd Cir. 1971).

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16. The district court did not make a finding that the practice of the JAC in referring apprentices for employment was in any way discriminatory.

POINT VIII

THE PROCEDURES FOR JOURNEYMAN ADMISSION TO LOCAL 28 PROVIDED IN THE APP&O SHOULD BE AVAILABLE ONLY TO THOSE PERSONS WHO RESIDE IN NEW YORK CITY

Paragraphs 10 and 15 of the AAP&O set forth the qualifications and procedures for admission to journeyman membership in Local 28, on the basis, respectively, of either a "hands-on" test or four years of pertinent experience (A. 1379, 1382). The eligibility requirements specify that an applicant must reside in the City of New York or in one of eight listed counties.[17]

The inclusion of persons within the admission coverage of the AAP&O who reside outside of New York City, is inappropriate and improper, since such residence is not reasonably related to the district court finding of discrimination or to the relief necessary to remedy such conduct.

In developing the racial goals for the composition of Local 28's membership, the district court identified and considered the class of individuals who were discriminatorily excluded from membership: non-whites in the relevant labor force within the jurisdiction of Local 28, to wit, the five boroughs of New York City. The Court's calculations did not

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17. Westchester, Nassau and Suffolk in New York, Passaic, Bergen, Hudson, Union and Essex in New Jersey.

include the ratio or relationship of non-whites to whites in the relevant labor force in the greater metropolitan area, which includes the eight additional counties now listed in the AAP&O. If this expanded geographic area were considered by the district court, the directed goals would have been substantially less than the 29% established by the Court.[18]

The purpose of the AAP&O and the procedures for admission to Local 28 provided therein,

> "...is to place eligible non-whites in the position they would have enjoyed had there been no discrimination. To do so here the court must determine what percentage of union and apprentice program members would today be non-white had the defendants not engaged in discriminatory practices. The best available measure of that percentage is the percentage of non-whites in the relevant labor force existing today within New York City." (Emphasis added) (A. 105-106)

It is apparent that the district court's careful construction of the 29% goal was predicated upon the relevant factors it deemed necessary to remedy the discrimination found and to make available the procedures of the AAP&O to the affected class - non-whites in the relevant labor force in New York City.

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18. See, e.g., Rios v. Enterprise Association Steamfitters, Local 638, 400 F.Supp. 983 (S.D.N.Y. 1975), on remand from 501 F.2d 622 (2nd Cir. 1974), in which the district court concluded that the appropriate non-white goal for Local 638, whose jurisdiction includes New York City, Nassau and Suffolk, should be 26%.

The availability of the AAP&O procedures should be coextensive with the scope of Local 28's jurisdiction since the scope of that jurisdiction forms the basis upon which the 29% goal was formulated and to which the goal is directed.

The extension of the AAP&O umbrella to non-whites who reside outside New York City is irreconcilable with the principles of the district court's computation of its 29% goal, and is unrelated to the discrimination found and the class to be assisted. Consequently, this procedure will not effectuate the remedial goals directed by the court. Indeed, such an unwarranted expansion will only serve to dilute and delay the opportunities available to the class sought to be benefitted by the AAP&O, to wit, the non-white labor force within Local 28's jurisdiction.

In summary, both to be consistent with the district court's rationale in identifying the relevant labor force to establish the 29% goal, and to provide relief proximately related to remedying the discrimination found, the AAP&O procedures for admission to Local 28 should be available only to non-whites who reside in New York City.

CONCLUSION

Based on all the foregoing, it is respectfully submitted that this Court vacate so much of the Affirmative Action Program and Order of the district court as is appealed from herein.

Respectfully submitted,

SOL BOGEN, Esq.
Attorney for Defendants-Appellants
Sheet Metal Workers' International
Association, Local Union No. 28,
and Local 28 Joint Apprenticeship
Committee
One Penn Plaza
New York, New York 10001

July 6, 1976

ADDENDUM

Statutes Involved

The following sections of Title VII are involved on this appeal:

Sec. 703(j):

(j) Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

Sec. 706(g):

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful

employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a).

Sec. 707(a):

(a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- x

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and THE CITY OF NEW YORK,

Plaintiffs-Appellees,

-against-

LOCAL 638 . . . LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 28 JOINT APPRENTICESHIP COMMITTEE,

Defendants-Appellants,

SHEET METAL AND AIR-CONDITIONING CONTRACTORS' ASSOCIATION OF NEW YORK CITY, INC., etc.,

Defendants.

DOCKET NO. 76-6003

AFFIDAVIT OF SERVICE

- x

LOCAL 28,

Third-Party Plaintiff,

-against-

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Third-Party Defendant.

- x

LOCAL 28 JOINT APPRENTICESHIP COMMITTEE,

Fourth-Party Plaintiff,

-against-

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Fourth-Party Defendant.

- x

AFFIDAVIT OF SERVICE

Service acknowledged of within Memorandum and Joint Appendix.

Date: 7/6/76
Time:

HONORABLE ROBERT FISKE

By _____

Date: 7/6/76
Time: 11 40 A.M.

HONORABLE W. BERNARD RICHLAND

By Steven Goldberg
Assistant Corporation Counsel

COPY OF THE WITHIN PAPER
RECEIVED
1976

Date: 7/6/76
Time: 11:45 AM

HONORABLE LOUIS J. LEFKOWITZ

By _____

Louis J. Lefkowitz
ATTORNEY GENERAL

Date: 7/6/76
Time: 10:00 am

ROSENTHAL & GOLDHABER

By William Rothenberg by MWS

Date:
Time:

_____
DAVID RAFF

AFFIDAVIT OF SERVICE

Service acknowledged of within Memorandum and Joint Appendix.

Date: July 6, 1976
Time: 11:25 AM

HONORABLE ROBERT FISKE

By Louis J. Lefkowitz

Date:
Time:

HONORABLE W. BERNARD RICHLAND

By _____

Date:
Time:

HONORABLE LOUIS J. LEFKOWITZ

By _____

Date:
Time:

ROSENTHAL & GOLDHABER

By _____

Date:
Time:

_____
DAVID RAFF

STATE OF NEW YORK, COUNTY OF *ss.:*

AFFIDAVIT OF PERSONAL SERVICE

, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at
That on the day of 19 at
deponent served the within
upon
by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therin.

Sworn to before me, this day of 19

.....
Type or Print Name Below Signature

STATE OF NEW YORK, COUNTY OF *ss.:*

INDIVIDUAL VERIFICATION

, being duly sworn, deposes and says that deponent is the in the within action; that deponent has read the foregoing and knows the contents thereof; that the same are true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes them to be true.

Sworn to before me, this day of 19

.....
Type or Print Name Below Signature

STATE OF NEW YORK, COUNTY OF *ss.:*

CORPORATE VERIFICATION

, being duly sworn, deposes and says that deponent is the of the corporation named in the within action; that deponent has read the foregoing and knows the contents thereof; and that the same are true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes them to be true.
This verification is made by deponent because
is a corporation. Deponent is an officer thereof, to-wit, its
The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me, this day of 19

.....
Type or Print Name Below Signature

STATE OF NEW YORK, COUNTY OF *ss.:*

AFFIRMATION BY ATTORNEY

The undersigned, an attorney admitted to practice in the State of New York, affirms: That the undersigned is the attorney(s) of record for in the within action; that the undersigned has read the foregoing and knows the contents thereof; that the same are true to affirmant's own knowledge, except as to the matters therein stated to be alleged on information and belief; and as to those matters affirmant believes them to be true.

The undersigned further states that the reason this affirmation is made by the undersigned and not by

The grounds of affirmant's belief as to all matters not stated to be upon affirmant's knowledge, are as follows:

The undersigned affirms that the foregoing statements are true, under the penalty of perjury.

Dated: 19

.....
Type or Print Name Below Signature

ATTORNEY'S CERTIFICATION

STATE OF NEW YORK, COUNTY OF

The undersigned, an attorney admitted to practice in the State of New York, does hereby certify, pursuant to Section 2105 CPLR, that I have compared the within

with the original and have found it to be a true and complete copy thereof.

Dated: *19*

.....

Type or Print Name Below Signature

NOTICE OF ENTRY OR SETTLEMENT

[Check and complete appropriate box and section]

Sir(s):

PLEASE TAKE NOTICE that a

of which the within is a (true) (certified) copy

☐ ***NOTICE OF ENTRY***

was duly entered in the within named court on *19*

☐ ***NOTICE OF SETTLEMENT***

will be presented for settlement to the Hon.

one of the judges of the within named court at the Courthouse at

on *19*

at *o'clock* *M.*

Dated: *19*

Yours, etc.,

SOL BOGEN

Attorney(s) for

Office and Post Office Address

ONE PENN PLAZA
NEW YORK, N. Y. 10001

To

Attorney(s) for

Index No. 76-6003 *Year 19*

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and THE CITY OF NEW YORK,

Plaintiffs-Appellees,

-against-

LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, et al.,

Defendants-Appellants.

AFFIDAVIT OF SERVICE

SOL BOGEN

Attorney(s) for Local 28 and JAC

Office and Post Office Address

ONE PENN PLAZA
NEW YORK, N. Y. 10001
(212) 736-7570

To

Attorney(s) for

ADMISSION OF SERVICE

The undersigned acknowledges receipt of a copy of the within

on *19*

at *o'clock* *M.*

.....

Attorney(s) for

by: .....

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK

COUNTY OF

being sworn, says: I am not a party to this action; I am over 18 years of age; I reside at

On *19* *I served the within*

upon

the attorney(s) for *in this action, at*

the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid, properly addressed wrapper, in an official depositary under the exclusive care and custody of the United States Postal Service within the State of New York.

.....

Type or Print Name Below Signature

Sworn to before me

this *day of* *19* .